Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

KEITH H. GILL, Petitioner

v.

VIDMARK, INC., ET AL., Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Has a federal district court the power to impose a sanction of $110,438.97 against an attorney because the attorney appealed to the Court of Appeals?

2. Has a district court the power to impose a sanction of $110,438.97 upon plaintiff's counsel without prior notice and hearing?

3. What factors, if any, must a district court consider and set forth before determining whether a case is frivolous, excluding it from the Federal Courts, and imposing a sanction upon plaintiff's counsel for filing such a lawsuit?

PARTIES TO THE PROCEEDINGS BELOW

This is Court of Appeals No. 91-56471, Herb Neft, et al., Plaintiffs, and Keith H. Gill, Appellant, v. Vidmark, Inc. et al., Defendants-Appellees.

This is district court CV 88-02136 RJK entitled, Herb Neft, et al., Plaintiffs, v. Vidmark, Inc., et al., Defendants.

Plaintiffs did not pursue their appeal and have no interest in the outcome of this Petition. Thus, the only Petitioner before this Court is Keith H. Gill, one of Plaintiffs' former counsel.

Respondents are: Vidmark, Inc., a corporation; Baker & Taylor Video, a corporation; Mark Amin and Barry Barnholtz, individuals.

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OPINIONS BELOW

Neft v. Vidmark, Inc., 923 F.2d 746 (9th Cir., 1991).

Copies of unreported opinions are included in the Appendix.

STATEMENT OF JURISDICTION

This Supreme Court has jurisdiction of this Petition under United States Constitution Article 3, Section 2, and 28 U.S.C. Section 1254 to review the Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit, and the decision of the U.S. District Court, Central District of California.

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit affirming the decision of the United States District Court, Central District of California sought to be reviewed was entered on November 17, 1993. Petitioner filed a timely Petition for rehearing, which was denied by order of the United States Court of Appeals for the Ninth Circuit on December 29, 1993.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, RULES AND REGULATIONS INVOLVED

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U.S. Constitution, Article 3	2
U.S. Constitution, First Amendment	19
28 U.S.C. Section 1254	2
17 U.S.C. Section 505	5, 13, 19, 22
Rule 11, F.R.C.P.	20
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CONCISE STATEMENT OF THE CASE

Petitioner respectfully prays that a writ of certiorari issue to review the decision and opinion of the United States Court of Appeals for the Ninth Circuit entered in this matter on November 17, 1993.

Sanctioned For Filing An Appeal

The district court imposed a sanction of $110,438.97 against plaintiffs' counsel because counsel filed an appeal on behalf of plaintiffs.

In the case below, the United States District Court for the Central District of California, exercising jurisdiction under the United States Copyright Act, awarded fees in the amount of $110,438.97 against plaintiffs only. When plaintiffs

appealed, the district court then imposed the sanction of $110,438.97 upon counsel for plaintiffs also. The district court imposed this sanction upon plaintiffs' counsel without prior notice or hearing, ostensibly under the authority of 17 U.S.C. Section 505 of the Copyright Act.

Upon appeal by attorney Keith H. Gill of the sanction against plaintiffs' counsel, the Court of Appeals reversed and remanded to the district court, determining only that 17 U.S.C. Section 505 does not authorize an award of fees against attorneys.

Upon rehearing, approximately two and one-half years after plaintiffs' complaint was filed, the district court allowed defendants to make a new motion for sanctions, requesting the identical

amount of $110,438.97 originally ordered by the district court against plaintiffs' counsel. This new motion targeted not plaintiffs nor the other members of plaintiffs' counsel, but only Keith H. Gill, the attorney who appealed from the original district court order for attorney sanctions.

Upon rehearing, the district court refused to change its mind. The court declared that it would find another reason to support the sanction against attorney Gill. The court disregarded the detailed opposition to defendants' new motion, which set forth specific facts showing Mr. Gill's extensive pre-filing investigation, and rejected the testimony of Fred Williamson, well known African-American author, actor, director and producer, who is the author of the

motion picture involved in the original controversy. The court held that Mr. Gill, as one of plaintiffs' attorneys, had relied exclusively upon Mr. Williamson; the court refused to consider all the other evidence of plaintiffs' pre-filing investigation, which refuted the court's conclusion.

The Original Controversy

Fred Williamson, well known African-American author, actor, director and producer wrote and published the motion picture, "Adios Amigos" with a copyright notice by Fred Williamson d.b.a., "Po' Boy Productions."

"Adios Amigos" features an entire cast of African-American actors and presents comedian Richard Pryor in the first major

motion picture of his career.

"Adios Amigos" had been exploited by others, but the United States Copyright Office had not issued a certificate of copyright registration for "Adios Amigos" before the litigation below commenced. After plaintiffs' action was filed, the Copyright Office issued a certificate of copyright registration for "Adios Amigos" to Fred Williamson.

Plaintiffs, a small video cassette distribution company, obtained from Fred Williamson the right to distribute videocassette copies of "Adios Amigos." Defendant Vidmark, Inc., one of America's largest video distribution companies, in competition with plaintiffs, attempted to obtain a

copyright registration for "Adios Amigos" from the U.S. Copyright Office, and was refused. Vidmark, Inc. then contacted Fred Williamson seeking a license, and was refused because Williamson had already licensed Plaintiffs.

Defendant Vidmark, Inc. and the other defendants then decided to duplicate and distribute copies of "Adios Amigos" without registration by the Copyright Office and without authorization by Fred Williamson. Plaintiffs then retained Mr. Gill and his partners as plaintiffs' counsel.

After examining the published copyright notice for "Adios Amigos" in the name of the d.b.a. for Fred Williamson, after examining the license to plaintiffs from Fred Williamson, after

discussing the matter with plaintiffs' Washington copyright counsel, after receiving the assurance of the United States Copyright Office that a certificate of copyright registration would be issued to Mr. Williamson for "Adios Amigos", and after receiving the assurance from Mr. Williamson that Mr. Williamson held the copyright for "Adios Amigos" and had not transferred the said copyright to anyone other than plaintiffs, plaintiffs' counsel then brought suit to enjoin defendants from distributing copies of "Adios Amigos."

Following several months of discovery, defendants produced an agreement with Debro Films, Inc., signed by a former actor's agent of Fred Williamson, Lee Winkler. Said agreement called for the production of a motion picture similar to

"Adios Amigos" but differing substantially from the actual "Adios Amigos" as published. Debro Films, Inc. never obtained a certificate of copyright registration for "Adios Amigos", nor did anyone else other than Fred Williamson.

Fred Williamson never signed any document transferring his copyright in "Adios Amigos" prior to his licensing agreement with plaintiffs. Fred Williamson testified that Mr. Williamson had never authorized anyone else to transfer Mr. Williamson's copyright in "Adios Amigos."

The district court rejected the testimony of Fred Williamson whom the court recognized as the author of "Adios Amigos"; Mr. Williamson claimed the copyright to "Adios Amigos" and

had licensed plaintiffs only.

The district court rejected the following facts:

1. The copyright notice on "Adios Amigos" is in the name of Fred Williamson d.b.a. "Po' Boy Productions."

2. The U.S. Copyright Office issued a certificate of registration to Fred Williamson and denied such a certificate to defendant Vidmark, Inc.

3. Fred Williamson never signed any document purporting to transfer any interest in "Adios Amigos" until he signed the license with plaintiffs.

The district court concluded that Fred Williamson had transferred his copyright in "Adios Amigos" as a result of Lee Winkler's agreement with Debro Films, Inc. The district court granted Summary Judgment for defendants and, at the request of defendants, under 17 U.S.C. Section 505, as a penalty for bringing the action, awarded defendants attorney's fees against plaintiffs.

Plaintiffs appealed said order of attorney's fees against plaintiffs. Upon notice of appeal, without giving plaintiffs' counsel notice and opportunity for hearing, the district court immediately assessed sanctions in the amount of $110,438.97 against plaintiffs and their counsel.

As set forth above under "Sanctioned For Filing An Appeal", attorney Gill appealed the award of sanctions, and the Court of Appeals for the Ninth Circuit reversed and remanded the order of the district court. Upon rehearing, the district court refused to reverse its previous award of sanctions against Mr. Gill. Once again, the court imposed the identical sanction of $110,438.97.

For the second time, Mr. Gill appealed this identical sanction. This time, the Court of Appeals affirmed the district court decision. The Court of Appeals opinion materially misstates the record below: Mr. Gill never negotiated any agreement with Mr. Williamson; Mr. Gill never misrepresented any fact nor any citation of law to the court.

REASONS FOR GRANTING THE WRIT

Summary of Argument

This Petition presents for review questions raising important issues of judicial administration which seriously affect the fairness, integrity and public reputation of judicial proceedings in a time when the rising tide of judicial cases encourages the arbitrary exercise of judicial power by the trial courts. Petitioner believes that the questions presented for review have not been decided previously by this Supreme Court.

The case below illustrates how a district court, without due process of law, can abuse its power by imposing a monetary sanction upon an attorney as a penalty for filing an appeal.

The case also calls into question the power of a district court to control its work load, excluding cases by labeling them frivolous, unguided by any specific criteria for determining whether or not a case is frivolous.

The possibility of subtle racial prejudice is inherent in this case. This action, brought to enforce the rights of an African-American author and producer in a motion picture produced with an all African-American cast, was labeled "frivolous" by the district court, despite strong evidence to the contrary.

This case presents an opportunity for the United States Supreme Court to instruct district courts in the proper use of judicial power. District courts must not destroy the Constitutional right

of appeal by sanctioning the attorneys who file the appeal.

The pressure of ever-increasing case loads requires the United States Supreme Court to set forth specific criteria to guide district courts in the proper identification of frivolous cases in order to avoid the misuse of attorney sanctions in a misguided attempt to control judicial workload. Such criteria must include the awareness that subtle racial, sexual, religious, social and economic biases, under the pressures of increasing workload, can cause the court to abuse its power.

Unless guided by the Supreme Court in the exercise of judicial power, district courts will cease to be seen by the public as temples of justice and, instead

will be seen as palaces of unrestrained power where persons less fortunate are sacrificed in the name of judicial economy.

Argument

District Courts Must Not Sanction Attorneys For Filing an Appeal

The district court below, in its Memorandum of Decision and Order of February 6, 1989 (Appendix B-3), awarded attorneys' fees of $110,438.97 against plaintiffs only. On February 10, 1989, plaintiffs filed Notice of Appeal of the said order of the district court. As a result of the appeal, the district court, on March 9, 1989, entered its Minute Order assessing said $110,438.97 against plaintiffs' counsel as well as against plaintiffs. Since defendants had

requested fees against plaintiffs under 17 U.S.C. Section 505 and not against plaintiffs' counsel, the district court clearly intended to sanction plaintiffs' counsel for filing the appeal.

"The circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." Alyeska Pipeline Service Co. v. Wilderness Society 421 U.S. 240, 262 (1975).

The power of the district court is not unlimited. The power of the district court cannot be used to deprive a litigant of his right of access to the courts subsumed under the First Amendment to the Constitution. Soranno's Gasco, Inc. v. Morgan 874 F.2d 1310, 1314 (9th

Cir. 1989).

Decisions in the federal court of appeals in the Sixth Circuit and Seventh Circuit agree that a district court is not empowered to award fees for appellate proceedings and cannot sanction a party or a lawyer for taking an appeal. Webster v. Sowders 846 F.2d 1032, 1040 (6th Cir. 1988); Flip Side Productions, Inc. v. JAM Productions, Ltd. 843 F.2d 1024, 1037 (7th Cir. 1988). As the Sixth Circuit observed, "Appeals of district court orders should not be deterred by threats by district judges." Webster v. Sowders at 1040.

Rule 11 can not be used as a justification for sanctioning an attorney for taking an appeal on behalf of a client. Rule 11 is applicable only in

federal trial court proceedings and not on appeal. A. Hirsh, Inc. v. United States, 948 F.2d 1240 (1991).

The order of the district court below imposing sanctions in the amount of $110,438.97 against an attorney for filing an appeal on behalf of a client is a case of plain error affecting substantial rights within the meaning of Supreme Court Rule 30.1(a).

Such acts of district courts in retribution for the exercise of constitutional rights destroy the fairness, integrity, and public reputation of judicial proceedings and create in the public a perception of unjust abuse of federal power. This case requires the attention of the Supreme Court. Connor v. Finch, 431 U.S. 407,

421 n.19, 52 L.Ed.2d 465, 97 S.Ct 1828 (1977).

The Supreme Court should instruct the district courts that district courts exceed their power when they sanction an attorney for filing an appeal.

District Courts Must Not Sanction Attorneys Without Prior Notice

In the case below, the district court, without prior notice nor hearing as to the attorney, imposed a sanction of $110,438.97 under 17 U.S.C. section 505 upon an attorney who filed an appeal on behalf of plaintiffs.

Upon rehearing after reversal by the Court of Appeals because 17 U.S.C. section 505 does not authorize sanctions

against attorneys, the district court permitted defendants to file a new motion against plaintiffs' attorney in order to justify imposition of the identical sanction against the attorney. While the new motion provided notice and hearing, the identical result as the original improper motion demonstrates that the district court sought only to justify the unlawful sanction originally imposed.

"The opportunity to persuade a court not to impose a sanction can hardly be said to be the procedural equivalent of persuading a court to rescind its action. The former is much more likely to result in a court approaching the issue with an open mind." Martineau, *Frivolous Appeals: the Uncertain Federal Response*, 1984 Duke L.J. 845, 875 n.174.

"Due process does require at the very least that the court notify, by means of an order to show cause, the person against whom it is considering imposing a sanction." Martineau, *cited above*, at 877.

In the case below, the district court, upset at plaintiffs' counsel for filing the notice of appeal, retaliated by levying a sanction of $110,438.97 against the attorneys. The district court, embarrassed by the Court of Appeals reversal based upon the district court's unjustified reliance upon 17 U.S.C. Section 505, sought only a justification to accomplish what it originally had done unlawfully. The district court violated the fundamental requirement of due process: "The requirement of an unbiased tribunal is fundamental to due process,"

Rosen v. N.L.R.B., 735 F.2d 564, 570 n.10, 236 U.S. App. D.C. 298 (D.C. Cir. 1984).

The court below and all district courts need to be reminded that "Like other sanctions, attorney's fees certainly should not be assessed lightly or without fair notice and an opportunity for a hearing on the record." Roadway Express, Inc. v. Piper, 447 U.S. 752, 767, 100 S.Ct. 455, 65 L.Ed.2d 488 (1980).

As the Ninth Circuit recognized, a district court does not have the power to impose monetary sanctions against attorneys without affording the attorneys procedural due process before imposing the sanctions. Miranda v. Southern Pacific Transportation Co., 710 F.2d 516,

523 (9th Cir. 1983).

This case presents a opportunity for the Supreme Court to instruct all lower courts that fundamental due process requires notice and opportunity for hearing before imposing sanctions upon attorneys.

Identification of "Frivolous" Cases Requires Application of Unbiased Criteria

The case below demonstrates how easily a district court can reject all contrary evidence and arbitrarily label a case "frivolous" in the absence of objective criteria.

The district court rejected the testimony of a noted African-American

author, director and producer and denied the author the rights to the author's motion picture, featuring an all African-American cast. The case demonstrates the opportunity for a district court to allow racial, religious, sexual, social and other prejudices to influence the classification of a case as "frivolous" in the absence of objective criteria.

In the case below, the U.S. Copyright Office recognized the right of the African-American author and rejected the claims of the defendants herein. The district court relied entirely upon an agreement not signed by the author, but by an unauthorized agent. The district court's decision clearly impaired the African-American author's Constitutional right of access to the courts. The unjust sanction imposed upon counsel

clearly deters other litigants from exercising Constitutional rights to litigate controversies.

Petitioner recognizes the over-burdened judicial system, but justice requires that the district courts not let the increasing litigation destroy the Constitutional right of every person to seek justice in our courts.

"For in fashioning a remedy to stem the flow of frivolous actions, a court must take great care not to unduly impair a litigant's Constitutional right of access to the courts." Urban v. United Nations, 768 F.2d 1497, 1500, 248 U.S. App. D.C. 64 (D.C. Cir. 1985).

As shown by the case below, the U.S. Supreme Court should set forth objective

criteria to guide the courts below in identifying "frivolous" cases. If not, arbitrary, prejudicial, and unconstitutional decisions result. Only the Supreme Court is in a position to instruct the courts and protect the rights of all litigants and their counsel.

Such objective criteria should include the consideration of possible prejudices created from the facts of the particular case.

If accepted, petitioner would be happy to suggest additional criteria in petitioner's brief.

CONCLUSION

This case presents the opportunity for the U.S. Supreme Court to instruct the

lower courts as follows:

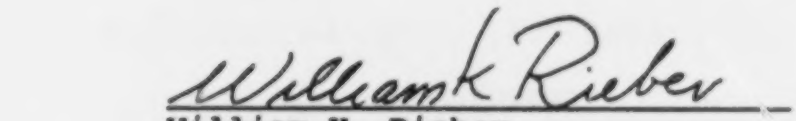
- District courts must not sanction attorneys for filing an appeal;

- District courts must not sanction attorneys without prior notice; and

- District courts must apply unbiased criteria in identifying "frivolous" cases.

In the case below, the district court violated each of the above imperatives, resulting in a decision to sanction an attorney which is unfair, unjust and detrimental to the Constitutional rights of litigants.

Respectfully submitted.



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APPENDIX A

[Filed: Nov. 17, 1993]

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HERB NEFT, Plaintiff, and KEITH H. GILL, Appellant, v. VIDMARK, INC., BAKER & TAYLOR VIDEO; MARK AMIN; BARRY BARNHOLTZ, Defendants-Appellees.	)	No.91-56471 D.C. No: CV-88-2136-RJK MEMORANDUM

Appeal from the United States District Court for the Central District of California, Robert J. Kelleher, District Judge, Presiding

Argued and Submitted April 5, 1993
Pasadena, California

Before: HALL, WIGGINS, and TROTT, Circuit Judges.

Appellant Keith Gill appeals from the district court's order of sanctions

Gill cites the comments to Rule 11 for the proposition that "[a] party seeking sanctions should give notice to the court and the offending party promptly upon discovering a basis for doing so." However, Gill had notice in 1988 that the court was considering whether he or his client acted in bad faith or frivolously, and that a finding in the affirmative could subject his client to liability for costs and attorneys' fees. Gill responded to this motion with a memorandum of points and authorities in opposition to defendants' motion, in which he argued that neither his client nor he acted in bad faith or frivolously. The court considered and rejected his claim. Although Gill may have believed that only his clients would be liable for any costs the court might impose, he cannot be heard to argue that

he would have been more diligent or would have argued more convincingly had he known that his client's wallet was not the only one at risk.

We conclude that the district court properly considered alternative theories to award sanctions after the case had been remanded to him. We further conclude that it was not an abuse of discretion for the district judge to impose sanctions more than three and one-half years after the complaint was filed because the case was appealed and remanded which accounted for most of the delay.

2. Did The Court Abuse Its Discretion By Imposing Rule 11 Sanctions On Gill?

Rule 11 sanctions are appropriate where a litigant makes a "'frivolous filing, ' that is, where he files a

pleading or other paper which no competent attorney could believe well grounded in fact and warranted by law; and where a litigant files a pleading or other paper for an 'improper purpose.'" Greenberg v. Sala, 822 F.2d 882, 885 (9th Cir. 1987) (citing Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531, 1538 (9th Cir. 1986) and Zaldivar v. City of Los Angeles, 780 F.2d 823, 829 (9th Cir. 1986).

Rule 11 provides that if it is violated, the court "shall impose upon the person who signed [the pleading or paper], a represented party, or both, an appropriate sanction... including a reasonable attorney's fee. " Fed. R. Civ. P. 11. See also id. Advisory Committee's Note ("If the duty imposed by [Rule 11] is violated, the court should have the discretion to impose sanctions on either

the attorney, the party the signing attorney represents, or both. .. .").

In the instant case the facts amply support the district court's finding that plaintiffs acted both in bad faith and frivolously. For exanple, the court noted that before Gill instigated the suit, he had received advice from a Washington, D.C. firm specializing in copyright that: 1) there was no registered copyright for the film, but that specified businesses, including defendant Vidmark's licensor, were marketing the film; 2) defense counsel had filed a document in the copyright office relating to a work with the title "Adios Amigos"; and 3) plaintiffs should contact Aurora, Vidmark's licensor, to determine from whom Aurora had obtained television syndication rights. In blatant disregard of this information,

Gill negotiated a licensing agreement with Williamson, who claimed to own the copyright.

The district court also found that Gill attempted to keep the suit alive in the face of a written agreement which transferred all Williamson's rights in the film's copyright long before plaintiffs negotiated their licensing agreement. Despite evidence of this agreement, Gill, on behalf of plaintiffs, made a variety of outrageous statements to the district court and completely misstated the applicable law in an attempt to avoid the conclusive effect of the agreement. For example, plaintiffs attempted to argue that Ramano Productions never really existed, even though Williamson had already testified that it did, and that Ramano was simply the name of Williamson's dog. Finally,

Gill violated numerous procedural rules. These facts support the district court's imposition of Rule 11 sanctions on Gill for his bad faith and frivolous conduct.

3. Did The District Court Abuse Its Discretion In Awarding 28 U.S.C. Section 1927 Sanctions Against Gill?

Section 1927 provides:

> Any attorney to other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. Section 1927 (1988).

Section 1927 sanctions require a bad faith finding. West Coast Theater Corp., 897 F.2d at 1528. This court has determined that "[b]ad faith is present when an attorney knowingly or recklessly raises a frivolous argument, or argues a meritorious claim of the purpose of harassing an opponent." Id. (quoting Soules v. Kauaians For Nukolii Camoaign Comm., 849 F.2d 1176, 1185-86 (9th Cir. 1988).

The facts above establish that Gill recklessly proceeded with the litigation despite a complete lack of factual support for his claim. Defendants continually proved Gill's own incredible assertions to be erroneous. For example, in response to Gill's statements that Ramano never existed, defendants obtained from the California Secretary of State, and presented to Gill, Ramano's 1974

Articles of Incorporation, and its subsequent amendments. These documents proved Ramano's existence in corporate form at all relevant times, and its subsequent name change to Po' Boy. Still, Gill forged ahead, steadfastly refusing to dismiss the action. From this conduct, we conclude that the district court did not abuse its discretion by imposing Secton 1927 sanctions on Gill.

4. Did The District Court Abuse Its Discretion By Finding That Gill Acted In Bad Faith?

Gill argues that the district court abused its discretion by refusing to acknowledge that Gill did not act frivolously or in bad faith. These factual arguments attempt to attach undue weight to certain facts. Gill points to

these facts: 1) that his clients held a written license from Fred Williamson, the author, producer, proprietor named in the Copyright Notice on the film; 2) that the defendants' published advertising stating the film was "written, directed, and produced" by Fred Williamson; 3) that the Copyright Office issued a Certificate of Copyright Registration for the film to Fred Williamson; and 4) that the agreement between Ramano and Debro releasing the videocassette rights to Debro was signed by Lee B. Winkler and not Fred Williamson.

These arguments ignore the fact that prior to the suit ever being filed, Gill had information and advice given to him by Washington, D.C. counsel that would have led him to the correct facts surrounding the defendants' chain of title. Moreover, these arguments ignore

the fact that defendants themselves provided Gill with all the information necessary to reach the conclusion that the claim was frivolous.

Thus, Gill's contention that the district court abused its discretion by finding that Gill had acted frivolously and in bad faith is meritless.

5. Was The District Court's Order Imposing Sanctions An Impermissible Disguised Attempt To Shift Fees?

Gill argues that the district court's order imposing, sanctions was really a disguised attempt to shift fees. As discussed above, there was ample evidence that Gill acted frivolously and in bad faith. The court's initial decision purported to award fees under 17 U.S.C. Section 505, buth the court set forth the facts surrounding Gill's

conduct and found that "the plaintiffs had pursued the suit in bad faith and that the suit was frivolous." We hold that the district court's order is not an impermissible disguised attmept to shift fees.

III

CONCLUSION

The district court did not abuse its discretion by imposing sanctions on Appellant under Fed. R. Civ. P. 11 and Section 1927. Moreover, the district court followed this court's instructions as set forth in Neft and provided a clear and concise explanation of its reasons for the fee award as demonstrated by its thorough discussion of the Kerr factors. We affirm the district court's decision.

[Filed: Nov. 17, 1993]

Neft and Gill v. Vidmark, No. 91-56471

WIGGINS, J., concurring separately:

I concur in the judgment of the district court, but I do not agree with the analysis of the majority. Hence, I write separately to explain my views.

We may affirm the judgment of the district court upon any grounds supportable by the record. Kruso v. I.T.T. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, 496 U.S. 937 (1990). Accordingly, we need not accept the arguments urged upon us by the parties.

Appellant protests the imposition of sanctions against him in the amount of $110,438.97. The sanction was imposed more than three and one half years after the judgment was entered, and was based upon the total amount of fees incurred by

respondent's counsel.

The majority concluded that the action filed by appellant was frivolousand filed in bad faith. I agree. From this conclusion, the majority proceeds to impose sanctions against the appellant based upon F.R.C.P. 11 and 28 U.S.C. Section 1927. In doing so, I believe the majority erred; however, the sanction may be affirmed under the inherent power of the court to sanction attorneys who appear before it. I rest my concurrence upon the exercise by the district court of its inherent power.

In re Yagman, 796 F.2d 1165, 1183, amended 803 F.2d 1085 (9th Cir. 1986) cautions against "punishing the offender after trial is at an end." This lesson from the Yagman case has not been scrupulously followed, see Community

Elec. Serv., Inc. v. Nat'l Elec. Contractors Ass'n, 869 F.2d 1235, 1242 (9th Cir.), cert. denied, 493 U.S. 891 (1989), but we should not disregard it totally in this case. It would have been far better to reject the imposition of Rule 11 sanctions because they were imposed more than three and one-half years after judgment, and to rely upon an alternative basis for their imposition.

Section 1927 of Title 28 should not be such an alternative basis to sustain sanctions, however. As the majority disposition notes, Section 1927 authorizes the imposition of "excess costs, expenses, and attorneys' fees" against an attorney who multiplies the proceedings unreasonably and vexatiously. The present case shifts the total amount of attorneys' fees incurred by the respondent to the appellant as a

sanction. We must conclude, therefore, that the appellant acted frivolously and in bad faith from the moment he served the complaint on respondent some three and one half years ago.

It is difficult to square the language of Section 1927 with the district court's finding that the action was filed and prosecuted frivolously and in bad faith. The term "excess" must mean those expenses and attorneys' fees that are greater than otherwise would be appropriate. If so, the sanction must be calculated on the expenses and fees incurred beyond the normal amount. Here, the district court totalled all fees, not "excess" fees.

There is, however, an alternate basis for affirming the judgment: the inherent power of the district court to impose sanctions as a means of

disciplining attorneys who appear before it. The power of the district court to do so is beyond question. Chambers v. NASCO, Inc., 111 S.Ct. 2123, 2134-36 (1991). We review the exercise of such power for an abuse of discretion. Id. at 2138; Lockary v. Kayfetz, 974 F.2d 1166, 1171 (9th Cir. 1992), cert. denied, sub nom., Pacific Legal Found. v. Kayfetz, 113 S.Ct. 2397 (1993).

The evidence before the district court establishes without question that there was ample basis for it to assert its inherent authority against appellant. Although I believe that, had I been the district judge, I may not have imposed a sanction of more than $110,000.00, I find no abuse of discretion in the district court viewing the matter differently.

Accordingly, I concur in the

affirmance of the judgment, but not for the reasons stated by the majority.

[Filed: December 29, 1993]
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HERB NEFT, Plaintiff, and KEITH H. GILL, Appellant, v. VIDMARK, INC., BAKER & TAYLOR VIDEO; MARK AMIN; BARRY BARNHOLTZ, Defendants-Appellees.	No. 91-56471 D.C. No. CV-88-2136-RJK ORDER

Before: HALL, WIGGINS, and TROTT, Circuit Judges.

The panel has voted to deny the appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on

whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

HERB NEFT; D.R.H., INC., a corporation; KARL JAMES ASSOCIATES, INC., a corporation; KARL JAMES PRODUCTIONS, INC., a corporation; GARY GRAY, Plaintiffs, and PELLETIER, SUPANCIC & GILL; FRANKLIN PELLETIER; RONALD SUPANCIC; KEITH C. GILL, Appellants, v. VIDMARK, INC., a corporation; BAKER & TAYLOR VIDEO, a corporation; MARK AMIN; BARRY BARNHOLTZ, Defendants-Appellees.	No. 89-55287 D.C. No. CV-88-2136-RJK OPINION

Appeal from the United States
District Court for the
Central District of California
Robert J. Kelleher,
District Judge, Presiding

Argued and Submitted
October 1, 1990--Pasadena, California

Filed January 17, 1991

Before: Robert Boochevcer,
Robert R. Beezer and Stephen S. Trott,
Circuit Judges.

Opinion by Judge Beezer

NEFT v.VlDMARK,INC.

SUMMARY

Attorney's Fees

Reversing and remanding a district court judgment assessing costs and attorneys' fees under the copyright statute, the court of appeals held that the copyright statute could not be used by the district court to impose sanctions on attorneys.

Herb Neft brought a copyright infringement action. Summary judgment was granted for defendants by the district court. The district court awarded costs and attorneys' fees against plaintiffs and their counsel under the copyright statute. Plaintiffs' counsel appealed.

[I] Section 505 of the copyright statute speaks only of allowing the recovery of costs by or against any party, and of awarding attorneys' fees to the prevailing party. There is no indication, either in the language of that section or in its legislative history, that Congess intended section 505 to be a means of imposing sanctions on attorneys. Accordinly, the assessment was reversed and remanded for reconsideration of defendants' motion for costs and fees.

COUNSEL

Keith C. Gill, Woodland Hills, California, for the appellants.

Edward A. Ruttenberg, Leopold, Petrich & Smith, Los Angeles, California, for the defendants-appellees.

OPINION

BEEZER, Circuit Judge:

This is an appeal of an assessment against "plaintiffs and their counsel, jointly and severally," of costs and attorney's fees under copyright statute 17 U.S.C. Section 505. We reverse the award and remand for reconsideration of defendants' motion for costs and fees.

Plaintiffs brought a copyright infringement action. The district court granted summary judgment in favor of defendants. Defendants then moved for costs and attorney's fees under 17 U.S.C. Section 505. The district court found that the suit was frivolous and that plaintiffs' persistence in litigating the claim was in bad faith. The court then ordered defense counsel to file an itemized list of fees and costs, and gave plaintiffs ten days from the time the

list was filed to object. Defendants submitted an itemized list reflecting fees and costs of $ 110,438.97. Plaintiffs did not file any opposition.

The district court found the amount claimed by defendants to be "reasonable." The court ordered that the full amount "be assessed against plaintiffs and their counsel, jointly and severally." Plaintiffs' counsel, Keith Gill, who was at the time of the suit a partner in the law partnership of Pelletier, Supancic & Gill, appealed.

[1] In Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 262 (1975), the Supreme Court stated that "the circumstances under which attorney's fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congess to determine." Section 505 speaks only of

amount claimed to be reasonable" and awarded the amount. The court did not articulate any reasons why it found the amount reasonable, and thus gave this court no basis for determining whether or not the district court abused its discretion. Upon reconsideration, the district court must provide "a concise but clear explanation of its reasons for the fee award." See Hensley v. Eckerhart, 461 U.S. 424, 433 n.7 (1983); Frank Music Corp. v. Metro-goldwyn-Mayer, Inc., 886 F.2d 1545, 1557 (9th Cir. 1989), cert. denied __U.S.__, 110 S.Ct. 1321 (1990) (attorney's fees awarded under 17 U.S.C. Section 505); Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975); cert. denied, sub nom Perking v. Screen Extras Guild, Inc., 425 U.S. 951 (1976).

APPENDIX B

[Filed September 10, 1991]
[Entered: September 12, 1991]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HERB NEFT, D.R.H., INC., a corporation, KEVIN BEECHUM, GARY GRAY, KARL JAMES ASSOCIATES, a General Partnership, KARL JAMES ASSOCIATES, INC., a corporation, KARL JAMES PRODUCTIONS, INC., a corporation, Plaintiffs, v. VIDMARK, INC., a corporation, BAKER & TAYLOR VIDEO, a corporation, MARK AMIN, BARRY BARNHOLTZ, and Does 1-5, Defendants.	No. CV 88-2136-RJK MEMORANDUM OF DECISION AND ORDER

This is a copyright infringement action concerning videocassette distribution rights for the 1975 film "Adios Amigo." On November 14, 1988, the Court granted summary judgment for the defendants. Defendants subsequently

filed for costs and attorney's fees under 17 U.S.C. Section 505 (Section 505), claiming that plaintiffs filed and prosecuted the action frivolously and in bad faith.[1] Section 505 allows the prevailing party in a copyright action to recover its reasonable attorney's fees. The Court awarded defendants reasonable attorney's fees and costs, holding that plaintiffs had indeed filed and prosecuted their action frivolously and in bad faith.

The Court then ordered defendants' counsel to file an itemized list of fees and costs, and gave plaintiff ten days to object. Defendants' list relected fees and costs of $110,438.97. Plaintiffs did not file an opposition. After finding

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[1]Ninth Circuit law requires a prevailing defendant to show bad faith or frivolity before it can recover attorney's fees.

the amount submitted by defendants to be reasonable, the Court ordered that the full amount "be assessed against plaintiffs and their counsel, jointly and severally."

Plaintiffs and counsel appealed to the Ninth Circuit, but the Ninth Circuit dismissed all but Mr. Gill's appeal before hearing the matter. Accordingly, the sole appellant before the Ninth Circuit was Mr. Gill.

In Neft v. Vidmark, 923 F.2d 746 (9th Cir. 1991), the Ninth Circuit reversed and remanded for consideration this Court's assessment of costs and attorneys' fees against Mr. Gill. The Ninth Circuit held that because Section 505 is not intended to be a means of imposing sanctions on attorneys, as opposed to parties, this Court had wrongfully used that section to assess

costs and attorney's fees against counsel.[2] Moreover, in a footnote, the panel held that "the district court must provide 'a concise but clear explanation of its reasons for the fee award'."[3]

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[2]In its opinion, the Ninth Circuit looked at the language of Section 505 and its legislative history, and concluded that Congress did not intend Section 505 to be a means of imposing sanctions on attorneys. The Court characterized the fees and costs award against Mr. Gill as a sanction because defendants' motion and this Court's order were based upon the theory that plaintiffs' suit was frivolous and prosecuted in bad faith. Defendants presented their motion under this theory in order to be eligible for costs and fees as prevailing <u>defendants</u> under Ninth Circuit rule.

[3]The Ninth Circuit stated, "Although the district court considered an itemized list of services performed by defendants' counsel, to which plaintiffs filed no objection, the court simply stated that it found 'the amount claimed to be reasonable' and awarded the amount. The court did not articulate any reasons why it found the amount reasonable and thus gave this court no basis for determining whether or not the district court abused its discretion."

Thus, on remand, this Court is to (1) reconsider defendants' motion for costs and fees against Mr. Gill in light of the fact that Section 505 does not provide for sanctions against attorneys; and (2) provide a concise but clear explanation of why any award this Court decides to give is reasonable. Because the Ninth Circuit did not address this Court's finding that plaintiffs' action was frivolous and prosecuted in bad faith, the Court presumes that it need not discuss this aspect of its original holding.

Before the court can address the merits of defendants' substantive arguments, the Court must first determine whether it may consider these new bases in its reconsideration of defendants' original motion. In the original motion, defendants requested attorneys' fees only

under Section 505. Defendants did not, as they do now, argue for sanctions under rule 11 of the Federal Rules of Civil Procedure, 28 U.S.C. Section 1927, Local Rule 27.1 and the Court's inheret powers. These arguments were raised for the first time on appeal. Defendants had, however, previously established facts which would support sanctions under these newly offered statutes.

Mr. Gill argues that defendants briefed these "new" arguments to the Ninth Circuit on appeal, and the Ninth Circuit "refused to hear" them because the arguments were improperly raised. A more logical conclusion, however, is that this Court is to examine if other legal authority supports the Court's award. This matter would not have been remanded otherwise. Had the appeals court believed that this Court were limited by

the grounds raised in the original motion, it would have known that this Court could find no other bases in the motion supporting its award, and would have reversed without remand.[4]

Accordingly, the Court has considered whether other bases exist which support its original award against Mr. Gill, and now holds that Rule 11 of the Federal Rules of Civil Procedure (Rule 11) and 28 U.S.C. Section 1927 justify the Court's prior finding that sanctions should be imposed in this case.[5]

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[4]Mr. Gill also argues that the Court is to reconsider only whether costs and fees should be awarded against plaintiffs in an amount that is reasonable. Mr. Gill focuses on footnote 1 of the Ninth Circuit's opinion which asks for a concise but clear explanation of why any award this Court decides to give is reasonable. However, it is clear that the only appellant before the Ninth Circuit was Mr. Gill.

Rule 11 provides that the signature of an attorney who signs a pleading, motion or other paper certifies "that to the best of the signer's knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interpreted for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Rule 11 authorizes the Court to sanction an attorney who violates this rule, which

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[4](cont.) Finally, Mr. Gill argues that defendants' present motion is time barred because defendants failed to raise their arguments in their original motion. This argument lacks merit, however, because this motion is a direct response to the Ninth Circuit's decision in this matter, and, as discussed above, properly raises these new arguments.

sanction may include an order to pay reasonable expenses incurred because of the filing of the pleading, including a reasonable attorney's fee.

The Court found that Mr. Gill filed and prosecuted the present motion frivolously and in bad faith. In connection with the action, Mr. Gill signed the complaint, a motion for a temporary restraining order, a summary judgment motion and a motion to dismiss. The Court is convinced that Mr. Gill unreasonably based his entire case upon his discussions with one person, Fred Williamson, plaintiffs' purported licensor, and refused to investigate

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[5]The court also believes that Local Rule 27.1 and the court's inherent powers provide additional bases for the court's award. The court does not feel, however, that it is necessary to discuss these souces of authority in light of the direct applicability of both Rule 11 and 28 U.S.C. Section 1927 to this case.

further. Because Mr. Gill failed to conduct a proper inquiry, the pleadings were not well grounded in fact or warranted by existing law, and needlessly increased the cost of litigation.[6] It is clear to this court that defendants' fees and costs figures accurately reflect expenses incurred as a result of Mr. Gill's failure to meet Rule 11's requirements, and that the court may justify its entire award based upon this rule.[7]

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[6]There is evidence that before the suit was filed, Mr. Gill had the names of entities with potential ownership rights in the film, the names of Vidmark's counsel and its licensor, and instructions form Washington D.C. counsel as to how to get relevant documentation and factual information regarding copyright ownership. Mr. Gill failed to pursue these avenues, choosing instead to rely on the self-serving statements of the alleged licensor. Moreover, after Mr. Gill filed suit, he continued to pursue his clients' claims despite evidence demonstrating that his action lacked merit.

28 U.S.C. Section 1927 (Section 1927) states that any attorney "who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct." In this case Mr. Gill continued prosecuting the action after defendants presented him with evidence which had the potential to completely refute the plaintiffs' case, while failing to complete his investigation of the plaintiffs' case after this evidence came to light. Such misconduct "multiplied" the proceedings since there should not have been any proceedings in the first place. Clearly

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[7]The Court discusses the reasonableness of the amount awarded below.

if Mr. Gill had done his job in good faith, defendants would not have incurred the fees they seek. Section 1927 is thus another justification for the award of attorney's fees and costs in this case.

Based upon the above discussion and defendants' prior showings of Mr. Gill's frivolous filing and bad faith prosecution of this case, the Court issatisfied that its prior award of reasonable attorney's fees and costs against Mr. Gill is justified by both Rule 11 and Section 1927.

The court now provides a concise but clear explanation of why its award was reasonable. When determining the amount of the Court's attorney's fees and costs award, the court had before it defense counsel Edward A. Ruttenberg's declaration outlining the monthly work performed by defense counsel during the

course of the litigation, from the date the complaint was filed until the date the Court granted the defendants' motion for summary judgment. The outline included the number of hours worked by, and rate charged for each attorney and paralegal performing such services, and an itemization of all costs incurred relating to such services (excluding costs previously awarded to defendants). The Court also had before it copies of the itemized bills sent by defense counsel to their clients. Because the outline and accompanying documents filed with the Court thoroughly and reasonably justified the fees charged and costs incurred by defense counsel, the Court accepted and relied upon those documents in reaching its decision.

The Court's award is further justified under the standards set forth

in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 70 (9th Cir. 1975). In Kerr, the Ninth Circuit adopted the following guicelines as appropriate factors to consider in determining the proper amount of a reasonable attorney's fee award: (1) the time and labor required, (2) the novelty and difficulty of the questions involved, (3) the skill equisite to perform the legal service properly, (4) the preclusion of other employment by the attorney due to acceptance of the case, (5) the customary fee, (6) whether the fee is fixed or contingent, (7) time limitations imposed by the client or the circumstances, (8) the amount involved and the results obtained, (9) the experience, reputation, and ability of the attorneys, (10) the undesirability of the case, (11) the nature and length of the professional

relationship with the client; and (12) awards in similar cases. Kerr, 526 F.2d at 70.

The time and labor required is evidenced by the bills, time sheets and itemizations that defense counsel submitted to the court in connection with the original request for attorney's fees. Among other things, defendants were required to locate numerous documents that dated back thirteen years and were held by different and unrelated third parties. Key documents were ultimately located in a storage warehouse in North Carolina. Defendants had to identify, locate and obtain declaratory testimony from relevant third party witnesses, and travel to Chicago and New York for depositions. Defendants successfully opposed Mr. Gill's requests for injunctive relief, dealt with Mr.

Gill's failure to comply with federal and local rules of court, prepared all required pre-trial documents, and prepared and argued a successful summary judgment motion.

As for the novelty and difficulty of questions involved, the Copyright questions involved were relatively simple. This factor does not, therefore, provide a basis for the award of any particular amount of fees.

The Court must also consider the skill requisite to perform the legal servlce properly. Defendants' counsel, Leopold, Petrich & Smith (LP&S), specialize in copyright infringement. Accordingly, defense counsel had no need to educate itself to defend this suit. Moreover, because of defense counsel's expertise, it is more likely that they were able to prepare economically and

efficiently for motions, discovery and trial.

Although the "preclusion of other employment" by defense Counsel is a Kerr factor, there was no significant showing of such preclusion. The Court did not, therefore, base its fee determination upon this factor.

As for the customary fee factor, LP&S seeks $ 175 per hour for the services of its partners, $ 120 per hour for its associates, and $ 55 for its paralegals. Defense counsel's detailed submission outlining its fees demonstrates that the amount defendants seek is not beyond the customary fee. Indeed, it appears that LP&S' rates may even be lower than those charged by other specialized firms.

Furthermore, LP&S' fees were fixed. LP&S will not receive a contingent bonus.

The Court did not consider time limitations imposed by the client and/or circumstances because there were no time limitations brought to the Court's attention.

As for the results obtained, LP&S achieved a complete victory for its client--plaintiffs lost their entire case on defendants' summary judgment motion. Although plaintiffs sought over $ 3 million in their lawsuit, the Court did not view this as a significant factor in determining the amount it should award.

The experience, reputation and ability of LP&S' attorneys in intellectual property cases, including copyright cases, is evidenced by LP&S' representation of defendants in many of the leading published decisions in this area.

Neither the undesirability of the

case nor the nature and length of the professional relationship were factors that affected the Court's determinations.

Finally, the Court must consider awards in similar cases. Defendants cite to Transgo, Inc. v. Ajac Transmission Parts Corp. 768 F.2d 1001 (9th Cir. 1985), which upheld an attorneys' fees award for $250,254, and Dresser Industries, Ic. v. Eltra Corp., 432 F. Supp. 153 (N.D. Ohio 1977), which awarded attorneys' fees of 1 $423,343.38. Although these cases do not directly support the award in this case, the amount this court has awarded is well supported by the billing and itemization submitted by defendants.

The Court believes that the above application of the Kerr factors, and the extremely detailed and thorough itemization of fees submitted by

defendants thoroughly justify the Court's award of $110,438.97 as reasonable attorney's fees. Significantly, plaintiffs have not opposed the award amount or the Kerr factors analysis.

The Court holds that defendants are entitled to attorney's fees and costs in the amount of $ 110,438.97 under Federal Rule of Civil Procedure 11 and 18 U.S.C. Section 1927. This Court also finds that the award amount is reasonable based on the Court's application of the Kerr factors to the circumstances of this case, and based on defendants' detailed itemization of fees and costs and the actual bills which defense counsel sent to the clients during the litigation. This Memorandum of Decision and Order shall be deemed the findings of fact and conclusions of law by the Court.

The Clerk shall send by United States mail, a copy of this Memorandum of Decision and Order to counsel for Mr. Gill, and counsel for the defendants.

Dated: September 10, 1991.

ROBERT J. KELLEHER

Senior Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No: CV-88-2136-RJK Date: 10-28-91

Title: HERB NEFT, et al. v. VIDMARK, INC., et al.

DOCKET ENTRY

PRESENT:

HON. ROBERT J. KELLEHER, JUDGE

William Horrell, Deputy Clerk

Candee Marsh, Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

William Rieber

ATTORNEYS PRESENT FOR DEFENDANTS:

Edward Ruttenberg

PROCEEDINGS: Keith Gill's motion for amendment to findings and for additional findings.

The Court hears argument of counsel.

The Court ORDERS that Keith Gill's motions are DENIED.

[Filed: Feb. 6, 1989]
[Entered: Feb. 7, 1989]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HERB NEFT, D.R.H., INC., a corporation; KEVIN BEECHUM, et al. ,	) No. CV88-2136-RJK (BX)
Plaintiffs,	)
v.	) MEMORANDUM OF DECISION AND ORDER
VIDMARK, INC., a corporation, et al.,	)
Defendants.	)

This is a copyright infringement action concerning videocassette distribution rights for the film ADIOS AMIGO. Summary judgment was granted in defendants' favor on November 14, 1988. The Court found that plaintiffs' licensor, Fred Williamson, did not own the copyright or the videocassette distribution rights for the film at the time he licensed such rights to plaintiffs. Defendants now seek to

recover their attorney fees.

The prevailing party in a copyright action can recoverits reasonable attorney fees. 17 U.S.C. Section 505. This holds for both prevailing plaintiffs and prevailing defendants.

However, in order for a prevailing defendant to recover its attorney fees, the Ninth Circuit requires a showing of bad faith or frivolity. Olsen v. National Broadcasting, 855 F.2d 1446, 1454 (9th Cir. 1988).

For the reasons set forth below, the Court finds both that plaintiffs have pursued this suit in bad faith and that the suit was frivolous.

Plaintiffs had notice that their licensor, Fred Williamson, did not own the copyright or videocassette distribution rights to ADIOS AMIGO before they instituted this suit in April 1988.

On February 4, 1988, plaintiffs ordered a copyright report for the film. The report indicated that while a copyright was never registered for the film, several businesses, including defendants' licensor, were in fact exploiting it. Plaintiffs were urged to contact these businesses, yet failed to do so. Instead, they contacted Fred Williamson, who claimed to own the film's copyright, and negotiated their licensing agreement. Plaintiffs never inquired into the validity of Williamson's claim of ownership.

Plaintiffs soon began making preparations to distribute videocassettes of the film. Upon learning of plaintiffs' activities, defendants sent plaintiffs a letter, dated March 25, 1988, notifying them that defendants owned such distribution rights.

Defendants demanded that plaintiffs cease and desist their distribution of the film. Again, plaintiffs failed to inquire into Williamson's alleged ownership of the film's copyright. Instead, on April 14, 1998, they instituted the present suit.

Plaintiff's bad faith in initiating this action was compounded by the manner in which they attempted to keep it alive in the face of uncontroverted evidence that Mr. Williamson had transferred all rights he may have had to the film's copyright in 1975.

Early on in discovery, defendants deposed Mr. Williamson. Mr. Williamson testified thmt ADIOS AMIGO was produced pursuant to a written agreement between his company, then named Ramano Productions, Inc, ("Ramano"), and Brut Productions. (It was later learned that

the agreement was in fact between Ramano and Debro Films, Inc. ("Debro"), a wholly-owned subsidiary of Brut.) After further discovery defendants located this agreement, which clearly granted the copyright and videocassette distribution rights to Debro. Defendants sent plaintiffs a copy of the agreement and demanded that the suit be dismissed. Plaintiffs refused, yet produced no other written agreement to support Williamson's claim of ownership of the copyright.

Plaintiffs then engaged in a course of inexcusable conduct. In a flagrant attempt to avoid the conclusive effect of the Ramano-Debro agreement, plaintiffs made a variety of misrepresentations and outrageous statements to the Court and completely misstated the applicable law.

For example, plaintiffs continually asserted that Ramano Productions, Inc.

never existed. They went so far as to state that Ramano was merely Williamson's dog! Plaintiffs also repeatedly maintained that ADIOS AMIGO was produced by Fred Williamson d/b/a Po' Boy Productions. In fact, Mr. Williamson stated in his Letter of Intent to plaintiffs, dated March 17, 1988, that ADIOS AMIGO was produced by "his company Romano [sic] Productions."

At no time did plaintiffs ever put forth a colorable legal argument in support of Mr. Williamson's claim of ownership of the copyright. For example, plaintiffs relied on the fact that the United States Copyright office had registered the copyright to ADIOS AMIGO in the name of Fred Williamson d/b/a Po' Boy Productions. However, the copyright was registered twelve years after the film was first published. Accordingly,

the registration certificate would not constitute prima facie evidence of Mr. Williamson's ownership. 17 U.S.C. Section 410(c).

Plaintiffs also relied on the fact that the film as released contained the copyright notice: "Copyright 1975 Po' Boy Productions. All Rights Reserved." However, at the time the notice was affixed to the film, Debro, not Mr. Williamson, owned the copyright. The mere placing of a copyright notice on a work will not effectuate a transfer from the true copyright owner. 17 U.S.C. Section 406(a). Thus, the copyright notice is legally insufficient to support Mr. Williamson's claim of ownership.

Finally, plaintiffs conducted this litigation in blatant disregard of the rules ana procedures of this Court. Plaintiffs have never once complied with

the local rules governing the filing of papers. Not only were their papers untimely, thereby effectively precluding defendants from filing their responsive papers, but they were deposited to the Court at all hours of the day and night, slipped under doorways and even left with janitors!

In sum, the Court finds that plaintiffs (1) failed to investigate the merits of their claim before instituting their suit, (2) failed to research the applicable law governing their claim, (3) failed to abide by the Court's procedural rules, and (4) made egregious misrepresentations to this Court. These findings amply support the Court's ultimate conclusion that plaintiffs' suit was frivolous and pursued in bad faith. See, e.g., Cooling Systems and Flexibles v. Stuart Radiator, 777 F.2d 485 (9th

Cir. 1985).

THEREFORE, IT IS HEREBY ORDERED that counsel for defendants serve upon counsel for plaintiffs and file with the Court an itemized list of their fees, detailing work performed by each attorney and hours spent thereon, costs of discovery, and any other compensable costs, by February 15, 1989. Plaintiffs shall have ten days thereafter to file objections. The matter shall then stand submitted on the filings, without oral argument, pursuant to Local Rule 7.11.

The Clerk shall send, by United States mail, a copy of this Memorandum of Decision and Order to counsel for the parties.

DATED: February 6 1989.

ROBERT J. KELLEHER

Senior Judge

[Filed January 4, 1989]

Pelletier, Supancic & Gill
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Woodland Hills, CA 91367
818/346-6700
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HERB NEFT, D.R.H., INC., a corporation, KEVIN BEECHUM, GARY GRAY, KARL JAMES ASSOCIATES, a General Partnership, KARL JAMES ASSOCIATES, INC. , a Corporation, KARL JAMES PRODUCTIONS, INC., a corporation, Plaintiffs, v. VIDMARK, INC., a corporation, BAKER & TAYLOR VIDEO, a corporation, MARK AMIN, BARRY BARNHOLTZ, and Does 1-5, Defendants.	NO. CV 88-02136 RJK NOTICE OF APPEAL OF ORDER OF SUMMARY JUDGMENT AND ORDER OF SANCTIONS AFTER MOTION FOR RECONSIDERATION

TO ALL DEFENDANTS AND TO THEIR ATTORNEYS OF RECORD:

Notice is hereby given that HERB NEFT, et al., Plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the Order granting Summary Judgment onbehalf of Defendants VIDMARK, INC., et al., above named, entered in this action on the 14th day of November, 1988, and from the Order denying Plaintiff's Motion for Reconsideration and awarding sanctions to Defendants against Plaintiffs, filed on this action on the 8th day of December, 1988.

Dated: January 03, 1989.

KEITH H. GILL

Pelletier, Supancic & Gill
21600 Oxnard Street, Suite 2000
Woodland Hills, CA 91367
Attorneys for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is: 21600 Oxnard Street, Suite 2000, Woodland Hills, California 91367.

On January 3, 1989, I served the foregoing document described as NOTICE OF APPEAL OF ORDER OF SUMMARY JUDGMENT AND ORDER OF SANCTIONS AFTER MOTION FOR RECONSIDERATION on the interested parties in this action by placing a true copy thereof in a sealed envelope addressed as follows:

Leopold, Petrich & Smith
Edward Ruttenberg, Esq.
2049 Century Park East
Suite 3110
Los Angeles, CA 90067-3274

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Woodland Hills, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on January 3, 1989, at Woodland Hills, California.

I declare that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

WILLIAM J. WATERS

[Entered March 9, 1989]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV88-02136-RJK Date: 3-7-89

Title: Neft, et al. v. Vidmark, et al.

DOCKET ENTRY

PRESENT:

HON. ROBERT J. KELLEHER

JAMES A. KIMBALL, Deputy Clerk

Court Reporter, N/A

ATTORNEYS PRESENT: N/A

PROCEEDlNGS: Defendants' Motion for Attorneys fees and Costs

THE COURT has before it defendants' motion for attorneys fees and costs pursuant to 17 U.S.C. Section 505. In compliance with the Court's Order of February 6, 1989 defendants' counsel timely filed an itemized list of the services they performed, the fees they charged therefore and the costs they incurred in performing said services. Plaintiffs have not filed any objections thereto. The matter stands submitted on the filings.

After review of the extremely detailed list of fees and costs provided by defendants' counsel the Court finds

the amount claimed to be reasonable.

THEREFORE IT IS HEREBY ORDERED that attorneys fees and costs in the amount of $110,438.97 be assessed against plaintiffs and their counsel, jointly and severally.

The Clerk will send a copy of this Order to counsel.

Keith Gill
21600 Oxnard Street
Suite 2000
Woodland Hills, CA 91367

Edward Ruttenberg
2049 Century Park East
Suite 3110
Los Angeles, CA 90067

Supreme Court, U.S.
FILED
APR 13 1994
OFFICE OF THE CLERK

No. 93-1538

In The

Supreme Court of the United States

October Term, 1993

KEITH H. GILL,

Petitioner,

vs.

VIDMARK, INC., BAKER & TAYLOR VIDEO, INC., MARK AMIN and BARRY BARNHOLTZ,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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25 pp

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Respondents VIDMARK, INC.[1], BAKER & TAYLOR VIDEO, INC., MARK AMIN and BARRY BARNHOLTZ oppose the Petition for Writ of Certiorari. Petitioner does not, and cannot, show any special or important reason for this Court to review the issue decided against him by the district court, acting within the proper exercise of its power and discretion, and affirmed by the United States Court of Appeals for the Ninth Circuit, that is, that Petitioner commenced and prosecuted the underlying action frivolously and in bad faith.

STATUTES INVOLVED

In addition to the statutes referred to in the Petition, this case involves 28 U.S.C. § 1927, which provides in relevant part that: "Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the Court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."

COUNTERSTATEMENT OF THE CASE

The decisions below, reproduced in the Petition's Appendix ("Pet. App."), provide a proper counterstatement of the case, particularly the district court's February 7, 1989 memorandum ("original memorandum") at Pet. App. B-50 to B-58, the district court's September 12, 1991

[1] Vidmark has the following partially owned affiliate: Trimark Interactive, a Delaware corporation.

memorandum *after* remand from the court of appeals ("the *post*-remand memorandum") at Pet. App. B-27 to B-47, and the unpublished court of appeals' decision, affirming the district court's post-remand award, at Pet. App. A-1 to A-18.

REASONS FOR DENYING THE WRIT

Petitioner has failed to demonstrate the existence of "special and important reasons" justifying review of the court of appeals' decision. Supreme Court Rule 10.1.

I.

THE COURT OF APPEALS' DECISION CREATES NO CONFLICT WITH ANY OTHER COURT OR DECISION.

The court of appeals' decision does *not* create any conflict with any decision of this Court, with any court of appeals, or with the highest court of any state, and Petitioner does not claim otherwise. Indeed, as an unpublished memorandum, the court of appeals' decision cannot even be cited as precedent on any issue in any court.

II.

BECAUSE THE DECISION BELOW RESTS ON A SPECIFIC FACTUAL DETERMINATION MADE WITHIN THE DISTRICT COURT'S PROPER EXERCISE OF ITS POWER AND DISCRETION, GRANT OF THE PETITION WILL NOT BE OF PRECEDENTIAL VALUE TO FUTURE LITIGANTS.

The award affirmed by the court of appeals' decision is based on the specific facts determined by the district

court within the proper exercise of its power and discretion. Hence, grant of the Petition would not lead to a decision by this Court that would be of precedential value to any future litigant.

III.

THE QUESTIONS PRESENTED IN THE PETITION WERE NOT RAISED BELOW.

None of the three "Questions Presented" in the Petition was raised by Petitioner below. *See* "Issues to be Raised on Appeal" (¶ I) in Petitioner's January 2, 1992 Civil Appeals Docketing Statement, attached in the Appendix hereto ("Opp. App.") at A-1 to A-8, and Petitioner's "Statement of the Issues Presented" contained in his March 11, 1992 Brief for the Appellant filed with the court of appeals after remand, attached as Opp. App. B-1 to B-4.

Consequently, only two of the ten case "authorities" referenced in the Petition – *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 955 S.Ct. 1612, 44 L.Ed. 2d 141 (1975), and *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed. 2d 488 (1980) – were cited by Petitioner in his briefs to the court of appeals, and these he cites in his Petition only for general propositions of law irrelevant to the specific facts of this case.

Moreover, by citing the "plain error" doctrine[2] and footnote 19 of the Mississippi reapportionment decision,

---

[2] Petitioner miscites the number of the rule to which he wishes to refer (Supreme Court Rule 24.1(a) – there is *no* Rule 30.1(a)). In any event, such rule relates only to whether the Court may allow an *appellant* to argue, *in his Brief on the Merits* (*after* certiorari is granted), a Question not listed in his Petition.

Connor v. Finch, 431 U.S. 407, 52 L.Ed. 2d 465, 97 S.Ct. 1828 (1977) [the Court has "the authority and duty in exceptional circumstances to notice federal court errors to which no exception has been taken"], Petitioner effectively admits that he did *not* preserve these Questions below.

IV.

THE FIRST TWO QUESTIONS PRESENTED IN THE PETITION REST UPON MISSTATEMENTS OF FACT.

The first two Questions Presented in the Petition rest upon complete misstatements of fact.

A. The District Court Did Not Sanction Petitioner For Filing An Appeal.

The district court did *not* sanction Petitioner for filing an appeal,[3] but for commencing and prosecuting the underlying action frivolously and in bad faith.[4] Accordingly, Petitioner's contrary assumption in Question 1 rests on a misstatement of fact.

---

[3] The Petition's reliance on *Webster v. Sowders*, 846 F.2d 1032, 1040 (6th Cir. 1988), is therefore misplaced. His citation to *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1314 (9th Cir. 1989), which did *not* involve the imposition of sanctions by any court, is inexplicable.

[4] Because the district court properly sanctioned Petitioner for fees and costs incurred by Respondents *at the trial court level* (and *not* at the appellate level), the Petition's references to *Flip Side Productions, Inc. v. JAM Productions, Ltd.*, 843 F.2d 1024, 1037 (7th Cir. 1988) and *A. Hirsch, Inc. v. United States*, 948 F.2d 1240, 1248 n.9 (1991), are unavailing.

B. The District Court Did Not Sanction Petitioner Without Prior Notice And Hearing.

Nor did the district court sanction Petitioner without prior notice and hearing.[5] To the contrary, the district court issued its *original* memorandum decision only *after* noticed motion and full briefing (although Petitioner declined the opportunity given him by the district court to oppose the reasonableness of the amount of Respondents' fees and costs – *see* Pet. App. B-64 to - 66). *See* Clerk's Record ("C.R.") at 81, 82, 83, 85, 87, 88 and 91. This original district court award was reversed *not* because of any inadequacy in the due process given Petitioner regarding the notice or hearing, but only because the court of appeals found improper the district court's reliance on 17 U.S.C. § 505. The court of appeals remanded the matter to the district court to determine whether other bases supported the award. *Neft v. Vidmark, Inc.*, 923 F.2d 746 (9th Cir. 1991).

Likewise, the district court's *post*-remand memorandum – which determined that the award against Petitioner was properly supported by Fed.R.Civ.P. 11 and 28 U.S.C. § 1927 – was issued only *after* noticed motion, full briefing and oral argument. *See* C.R. 107, 108, 109, 110, 111, 112, 115, 116, 117, 118, 119, 120, 121 and 122. In fact, Petitioner even filed *supplemental* opposition papers, written objections to Respondents' proposed findings, and written requests for additional findings, and later moved to amend the findings as entered. *See* C.R. 111, 124, 125,

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[5] *Miranda v. Southern Pacific Trans. Co.*, 710 F.2d 516, 523 (9th Cir. 1983), thus offers Petitioner no assistance.

126, 127, 128 and 129. Indeed, notwithstanding his phrasing of Question 2, Petitioner *admits* that Respondents' "[post-remand] motion provided notice and hearing." Petition at 23. Petitioner's contrary assumption in Question 2 thus misstates the true facts.

V.

THERE IS NO REASON FOR THE COURT TO ACCEPT THE GENERAL SUGGESTION IN THE THIRD QUESTION PRESENTED THAT THE COURT SET FORTH SPECIFIC CRITERIA FOR DETERMINING WHEN AN ACTION IS FRIVOLOUS.

Petitioner's third "Question Presented" merely suggests generally that this Court "set forth specific criteria to guide district courts in the proper identification of frivolous cases . . . " Petition at 17. The district court, however, properly analyzed the issues before it under Fed.R.Civ.P. 11 and 28 U.S.C. § 1927, and determined within its power and discretion that Petitioner commenced and prosecuted the underlying action frivolously and in bad faith by "fail[ing] to conduct a proper inquiry before filing the action," filing "pleadings [that] were not well-grounded in fact or warranted by existing law," and "needlessly increas[ing] the cost of litigation." District court's post-remand memorandum at Pet. App. B-36. The court of appeals agreed. Court of appeals' decision at Pet. App. A-3 to A-11. There is no special or important reason for this Court to reexamine or modify this accepted analysis in response to Petitioner's general and unfocused request that it do so.[6]

---

[6] Petitioner excises language from *Urban v. United Nations*, 768 F.2d 1497, 1500 (D.C.Cir. 1985) and *Rosen v. N.L.R.B.*, 735

VI.

THE PETITION'S PREVIOUSLY UNRAISED INSINUATION OF RACIAL BIAS IS MERITLESS.

Although not raised specifically in its three "Questions Presented," the Petition insinuates that the decision below may have been based on "subtle racial prejudice." Petition at 16. *See also,* Petition at 7 and 27. Such claim was never even suggested below by Petitioner, much less raised by him, and is, in any event, unsupportable. The race of no party, representative, witness or declarant was ever disclosed to any court, relevant to any decision by any court, or the basis thereof. In fact, all of the individual parties and representatives of the corporate parties appearing in the underlying action, as well as their counsel, are white, and the outcome of that action had no effect on any of the third parties whom Petitioner advises the Court are African-Americans. Such references simply demonstrate Petitioner's desperate attempt to portray the present dispute as something more than it is.

VII.

THE DECISION BELOW IS CORRECT.

The decision below is entirely correct. As the original and post-remand memoranda of the district court, and the court of appeals' decision, demonstrate, Petitioner

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F.2d 564, 570 n.10 (D.C. Cir. 1984), apparently without even reading the cases. The *Rosen* court found that administrative proceedings *complied* with due process; *Urban* enjoined a *pro se* from further litigation absent his fulfillment of specified preconditions. Neither case assists Petitioner.

commenced and prosecuted the underlying action frivolously and in bad faith, as a result of which the district court, pursuant to noticed motion, awarded sanctions under Fed.R.Civ.P. 11 and 28 U.S.C. § 1927. The court of appeals' decision affirmed the district court's proper exercise of its discretion to award such sanctions jointly against plaintiffs *and their counsel*, Petitioner, whose personal actions and failures to act – with regard to both substantive *and* procedural issues – bore primary responsibility for such award. In fact, although Petitioner argued to the district court on *numerous* occasions that he did not commence and prosecute the action frivolously and in bad faith (*see* C.R. 85, 109, 111, 112, 119, 120, 124, 126 and 128), and to two separate panels of the court of appeals, *no* judge at *any* level has *ever* suggested that the district court finding that Petitioner prosecuted the action frivolously and in bad faith was in any way factually unsupported, "clearly erroneous," an "abuse of discretion" or in excess of the court's "power."

VIII.

CONCLUSION.

For the foregoing reasons, Respondents respectfully submit that the Petition for Writ of Certiorari ought to be denied.

DATED: April 13, 1994.

Respectfully submitted,

LOUIS P. PETRICH
(Counsel of Record)
EDWARD A. RUTTENBERG OF
LEOPOLD, PETRICH & SMITH
A PROFESSIONAL CORPORATION
Attorneys for Respondents
Vidmark, Inc., Baker & Taylor
Video, Inc., Mark Amin and
Barry Barnholtz

APPENDIX A

UNITED STATES COURT
OF APPEALS
FOR THE NINTH CIRCUIT
P.O. BOX 91510
PASADENA, CA 91109-1510

Court of Appeals
Docket Number
91-56471

YOU MUST FILE AN ORIGINAL AND ONE COPY OF THIS FORM WITH THE CLERK OF THIS COURT WITHIN 14 CALENDAR DAYS OF THE DATE THE FORM IS SENT BY THE CLERK. YOU MUST ATTACH TO THE ORIGINAL AND TO THE COPY OF THIS FORM (1) A COPY OF THE JUDGMENT OR ORDER APPEALED FROM, (2) A COPY OF ANY OPINION OR FINDINGS OF FACT AND CONCLUSIONS OF LAW SUPPORTING THE JUDGMENT OR ORDER, AND (3) PROOF OF SERVICE ON OPPOSING COUNSEL.

CIVIL APPEALS DOCKETING STATEMENT

Case Name: HERB NEFT, et al. vs. VIDMARK, INC., et al.

District Court/Agency: U.S. District Court for the Central District Calif.

District Court/Agency Docket No.: /CV88-2136RJK
District Judge: Kelleher

Party filing appeal/petition: Keith H. Gill, One of Plaintiffs' former attorneys.

A. Timeliness of Appeals or Petition for Review or Enforcement:

(1) Date of entry of judgment or order: September 12, 1991; Oct. 28, 1991

(2) Service Date of any post-judgment motion (other than motion for fees and costs) /September 19, 1991

(3) Date of entry of order deciding post-judgment motion: October 28, 1991

(4) Date notice of appeal or petition filed: November 14, 1991

(5) Last day for filing appeal or petition: November 27, 1991

(6) Authority fixing time limit for filing appeal or petition:

Fed. R. App. P. 4(a)(1)X
Fed. R. App. P. 4(a)(4)_
Fed. R. App. P. 4(a)(2)_
Fed. R. App. P. 4(a)(5)_
Fed. R. App. P. 4(a)(3)_
Other_

B. Appeal from District Court:

(1) Is the order appealed from a final order (i.e., does it dispose of the action as to *all* claims by *all* parties? yes

(2) If the order is not a final disposition as to all claims by all parties, did the district court direct the entry of judgment in accordance with Fed. R. Civ. P. 54(b)? N/A

(3) If not final, is the order appealable as the grant or denial of an injunction under 28 U.S.C. § 1292(a)(1)? N/A

(4) If none of the above applies, what is the basis for appellate jurisdiction? N/A

C. Review of Agency Decision:

If the appeal is from an agency decision, what statute or other authority grants this court power to review that decision? N/A

D. Nature of Relief Sought Below

( ) Damages:
Amount sought $_____
Amount granted $_____

( ) Injunctive Relief
( ) preliminary ( ) permanent
( ) granted ( ) denied

( ) Declaratory Relief:
( ) granted ( ) denied

( ) Attorney Fees:
Amount sought $_____
Amount granted $_____

( ) Other (specify)
Sanctions under Rule 11 and 28 U.S.C. sec. 1927

E. Nature of Disposition Below:

( ) Bench Trial
( ) Jury Verdict
( ) Summary Judgment
( ) Grant/Denial of Injuntion
( ) Default Judgment
( ) Agency Order
( ) Dismissal:
( ) Lack of Jurisdiction
( ) Failure to State a Claim
( ) Failure to Prosecute
( ) Other _____

(X) Other sanctions granted in the amount of $110,438.97.

F. Length of Trial or Hearing:

Equivalent of 20 minutes

G. Preparation of Reporter's Transcript:

(1) Do you intend to order any portion of the reporter's transcript for the appeal? Yes x No __

(2) Have you filed the transcript designation and ordering form in the district court? Yes __ No x__ to be filed 1/3/92 Have you made arrangements for payment with the court reporter? Yes __ No __ to be on 1/3/92

(3) Estimated date of completion of transcript (if known): __

H. Brief Description of the Nature of the Action and the result below:

In the underlying action, on March 9, 1989, the District Court granted Defendants' motion for attorneys fees under 17 USC Section 505. On January 17, 1991, the Court of Appeals reversed and remanded the March 9, 1989, order, holding that Section 505 did not authorize award of attorneys fees against attorney Gill. On June 28, 1991, Defendants' under the guise of "remand" filed a new motion against attorney Gill only, under Rule 11, 28 USC Section 1927, and Local Rule 27.1. On September 12, 1991, the Court below granted Defendants' motion and awarded sanctions of $110,438.97 (the same amount reversed by the Court of Appeals) and on October 28, 1991, the Court

below denied Gill's Motion for Amendment of Decision and for Aditional [sic] Findings of Fact.

I. Issues to be Raised on Appeal:

1, Whether the District Court abused its discretion by failing to find the additional facts in the record as requested by Appellant Gill;

2. Whether the District Court abused its discretion by awarding attorneys fees under Rule 11 and 28 USC section 1927 two and one-half years after the conclusion of the underlying action;

3. Whether the District Court abused its discretion by awarding attorneys fees against Appellant Gill;

4. Whether the District Court's Conclusion of Law that Gill relied only upon the representations of the author of the motion picture in question is entirely without support in the record of the case;

5, Whether the District Court misunderstood the Order of the Court of Appeal reversing and remanding and failed to apply the law of the case;

6. Whether the District Court is engaged in "fee shifting" prohibited by law;

7. Whether the District Court gave concise but clear reasons for award.

J. Standard of Appellate Review (Specify the proper standard of review to be applied by the court for each issue to be raised, citing relevant authority):

Abuse of discretion generally, as to appropriateness of the sanction imposed;

Clearly erroneous standard as to the facts relied upon by the District Court to establish a violation of Rule 11;

Review *de novo* of the legal conclusion of the District Court that the facts constitute a violation of Rule 11;

Zaldivar v. City of Los Angeles (9th Cir., 1986) 780 F.2d 823, 828

K. Do you believe that settlement is feasible in this case? Yes__ NOx Why or why not?

Appellant Gill believes that the Court's Orders appealed from are without any foundation in the record and constitute a complete abuse of discretion.

L. Would a prebriefing conference be useful in this case? Yes__ NoX Why or why not?

The issues are set forth in the pleadings; the facts are not set forth in the Court's Orders, but the facts are not disputed in the record below.

M. Related Cases: List all related cases pending in this court as defined in Ninth Circuit Rule 28-2.6:

None known to Appellant

N. Attorney(s) Representing Appellee(s)/Respondent(s)

Attorney _____ Telephone_____

Firm _____

Address _____

Client _____

Attorney Edward A. Ruttenberg

Telephone (213) 277-3333

Firm Leopold, Petrich & Smith

Address 2049 Century Park East, Suite 3110
Los Angeles, California 90067-3274

Client Defendants Vidmark, Inc. et al.

Attorney _____ Telephone _____

Firm _____

Address _____

Client _____

(List additional counsel on separate sheet if necessary)

O. Attorney or Appellant (if pro se) Filing Docket Statement

Name William K. Rieber Telephone (310) 454-5770

Firm Law Offices of William K. Rieber

Address 15200 Sunset Boulevard, Suite 208

Pacific Palisades, California 90272

Check one: (x) Attorney
( ) Appellant pro se

/s/ William K. Rieber
Signature

January 2, 1992
Date

If this is a joint statement by multiple appellants, add the names and address of other counsel on an additional

sheet accompanied by a certification that they concur in the filing of this statement

---

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-56471

HERB NEFT, et al.,

Plaintiffs

and

KEITH H. GILL

Appellant

v.

VIDMARK, INC. et al.,

Defendants-Appellees

ON APPEAL FROM THE DECISION
OF THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE APPELLANT

STATEMENT OF THE ISSUES PRESENTED

1. Whether the District Court's Order of attorneys' fees in the sum of $110,438.97 imposed upon an attorney for Plaintiffs, under Rule 11 of the Federal Rules of Civil Procedure, 28 U.S.C. § 1927, Local Rule 27.1 and the Court's inherent powers, more than three years after the complaint was filed and two and one-half years after the

conclusion of the underlying action, is an abuse of judicial discretion.

2. Whether the refusal of the District Court to find the requested additional facts in the Record showing that the Complaint was filed "after reasonable inquiry" and that the action was prosecuted in good faith is an abuse of judicial discretion.

3. Whether the district court's conclusion: "In *Neft v. Vidmark*, 923 F.2d 746 (9th Cir. 1991), the Ninth Circuit reversed and remanded for consideration this Court's assessment of costs and attorneys' fees against Mr. Gill." is erroneous.

4. Whether the District Court's findings and conclusions of law that:

(a) "Mr. Gill filed and prosecuted the present action frivolously and in bad faith";

(b) "The Court is convinced that Mr. Gill unreasonably based his entire case upon his discussions with one person, Fred Williamson, plaintiffs' purported licensor, and refused to investigate further.";

(c) "Because Mr. Gill failed to conduct a proper inquiry, the pleadings were not well grounded in fact or warranted by existing law, and needlessly increased the cost of litigation"; and (d) "In this case Mr. Gill continued prosecuting the action after defendants presented him with evidence which had the potential to completely refute the plaintiffs' case, while failing to complete his investigation of the plaintiffs' case after this evidence came to light."; each are entirely without support in the Record of this case and are clearly erroneous.

5. Whether the Memorandum of Decision and Order of the Distrct [sic] Court is an attempted impermissable [sic] "fee shifting".

6. Whether the District Court misunderstood the Decision of the United States Court of Appeals for the Ninth Circuit reversing and remanding the prior Order of the District Court "for reconsideration of defendants' motion for costs and fees", [which motion was brought under 17 U.S.C. § 505, not Rule 11 nor 28 U.S.C. § 1927, and was brought against Plaintiffs only, not against plaintiffs' counsel.]

JURISDICTION

A. *District Court*

The District Court exercised subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1338.

B. *Appealability*

The orders appealed are final; this Court exercises jurisdiction pursuant to 28 U.S.C. § 1291. *Reygo Pacific Corp. v. Johnson Pump Co.*, 680 F.2d 647, 648 (9th Cir., 1982).

C. *Timeliness*

The Memorandum of Decision and Order appealed was entered on September 12, 1991. The Minute Order denying the Motions of Keith H. Gill for amendment of findings and for additional findings of fact was entered on October 28, 1991. The Notice of appeal from the Order entered on September 12, 1991, and from the Minute

Order entered on October 28, 1991, was filed on November 14, 1991, and therefore was timely under

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